

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

ROBERT McCONNELL,

**Petitioner,**

v.

WILLIAM GITTERE, *et al.*,

## Respondents.

Case No. 3:10-cv-00021-GMN-WGC

## ORDER

WILLIAM GITTERE, et al.

## Respondents.

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In this capital habeas corpus action, on April 3, 2020, the petitioner, Robert Pennell, represented by appointed counsel, filed a second amended petition for writ of habeas corpus (ECF No. 95). Respondents then filed a motion to dismiss (ECF No. 100) on October 8, 2020.

On December 7, 2020, McConnell filed a Motion to Strike, or, in the Alternative, for More Definite Statement (ECF No. 107). In that motion, McConnell argues e part of the motion to dismiss based on the statute of limitations does not state sserted defense with sufficient particularity, and, therefore, does not give him fair of the scope of the motion such that he may fairly respond to it. Respondents illed an opposition to McConnell’s motion (ECF No. 111), and McConnell has filed y (ECF No. 113). The Court will grant the motion, will deny the motion to dismiss t prejudice, and will require Respondents to file a new motion to dismiss ately setting forth their statute of limitations defense or abandoning that defense.

In their motion to dismiss, in their two-page argument asserting the statute of limitations defense, Respondents concede that McConnell's original and first amended complaints (ECF Nos. 1, 24) were timely filed, but they argue that McConnell's second amended petition was filed after the expiration of the limitations period. See Motion to

1 Dismiss (ECF No. 105), pp. 4–5. Respondents’ entire argument based on the statute of  
2 limitations is as follows:

3 This action is governed by the provisions of the Antiterrorism and  
4 Effective Death Penalty Act of 1996 (AEDPA). The AEDPA created a one-  
5 year statute of limitations, which can be found at 28 U.S.C. § 2244(d) and  
provides:

6 (1) A 1-year period of limitation shall apply to an application  
7 for a writ of habeas corpus by a person in custody pursuant  
to the judgment of a State court. The limitation period shall  
run from the latest of -- . . .

8 (A) the date on which the judgment became  
9 final by the conclusion of direct review or the  
expiration of the time for seeking such review;

10 (B) the date on which the impediment to filing  
11 an application created by State action in  
violation of the Constitution or laws of the  
12 United States is removed, if the applicant was  
prevented from filing by such state action;

13 (C) the date on which the constitutional right  
14 asserted was initially recognized by the  
Supreme Court, if the right has been newly  
15 recognized by the Supreme Court and made  
retroactively applicable to cases on collateral  
review; or

16 (D) the date on which the factual predicate of  
17 the claim or claims presented could have been  
discovered through the exercise of due  
18 diligence.

19 (2) The time during which a properly filed application for  
20 state postconviction or other collateral review with respect to  
the pertinent judgment or claim is pending shall not be  
21 counted toward any period of limitation under this  
subsection.

22 The statute of limitations is typically calculated from the date of finality, but  
23 a petitioner may establish he is entitled to delayed accrual under 28  
U.S.C. 2244(d)(1)(B) through (D) on a claim-by-claim basis. *Mardesich v.*  
*Cate*, 668 F.3d 1164 (9th Cir. 2012). If a petitioner seeks a petition for writ  
24 of certiorari in the Supreme Court of the United States, his conviction is  
considered final when the Supreme Court resolves the petition for writ of  
certiorari.

25 The Nevada Supreme Court affirmed on direct appeal and because  
26 the state filed a petition for rehearing, the time for McConnell to file a  
petition for writ of certiorari did not expire until 90 days after the Nevada  
27 Supreme Court denied rehearing. The opinion denying rehearing issued  
on March 25, 2005, ECF No. 25-3, giving McConnell until June 23, 2005,

1 to file a timely petition for writ of certiorari. While he did not petition for  
 2 certiorari, McConnell filed his first state post-conviction petition on June  
 3 10, 2005. Exhibit 5. Thus, as soon as McConnell's conviction was final  
 4 under 28 U.S.C. § 2244(d)(1)(A), the tolling provision of 28 U.S.C.  
 5 § 2244(d)(2) kicked in.

6       The remittitur from McConnell's first state post-conviction appeal  
 7 issued on November 3, 2009, Exhibit 17, giving McConnell until November  
 8 3, 2010, to file a timely federal petition. McConnell filed his original federal  
 9 petition on January 13, 2010. ECF No. 1. And he filed his first-amended  
 10 federal petition on October 6, 2010. ECF No. 24.

11       However, he filed the operative petition in this case—the second-  
 12 amended petition—well after expiration of the statute of limitations on  
 13 April 3, 2020. ECF No. 96. As a result, absent McConnell showing that  
 14 individual claims of the second-amended petition are timely under the  
 15 delayed accrual provisions of 28 U.S.C. 2244(d)(1)(B) through (D), his  
 16 second-amended petition is untimely in its entirety. McConnell may,  
 however, be able to avoid dismissal of any untimely claims if he can carry  
 his burden of establishing that he is actually innocent, that he is entitled to  
 equitable tolling, or that his claims relate back to one of his prior timely  
 filed pleadings. *McQuiggin v. Perkins*, 569 U.S. 383 (2013)  
 (acknowledging that a claim of actual innocence can overcome the  
 AEDPA statute of limitations); *Smith v. Davis*, 953 F.3d 582, 588–99 (9th  
 Cir. 2020) (en banc) (addressing the standard for establishing equitable  
 tolling); *Ross v. Williams*, 950 F.3d 1160, 1167, 1172 (9th Cir. 2020)  
 (identifying standard requiring a petitioner to show that “each claim in the  
 amended petition” relates back to a prior timely filed pleading and  
 acknowledging that a court may dismiss a petition as untimely  
 where the pleadings or additional briefing fail to “identify the specific  
 portions of an earlier pleading that contain the relevant factual material to  
 which the new pleading is attempting to relate back”).

17 *Id.*

18       McConnell's second amended habeas petition is over 300 pages long, and it  
 19 includes 18 claims, many with multiple subparts. A brief comparison of McConnell's  
 20 second amended petition with his first amended petition reveals that there is substantial  
 21 overlap between the two.

22       Under the Federal Rules of Civil Procedure, an amended pleading relates back  
 23 to the date of an earlier pleading when “the amendment asserts a claim … that arose  
 24 out of the conduct, transaction, or occurrence set out—or attempted to be set out—in  
 25 the original pleading.” Fed. R. Civ. P. 15(c)(1)(B); see also *Mayle v. Felix*, 545 U.S. 644,  
 26 649 (2005). However, a claim in an amended habeas petition does not meet the  
 27 relation-back standard “when it asserts a new ground for relief supported by facts that  
 28 differ in both time and type from the original pleading ....” *Mayle*, 545 U.S. at 650.

1       The AEDPA statute of limitations applies on a claim-by-claim basis. See  
 2 *Mardesich v. Cate*, 668 F.3d 1164, 1170–71 (9th Cir. 2012). With respect to  
 3 McConnell’s second amended petition, this means that the timeliness of each of  
 4 McConnell’s claims under the statute of limitations turns on the question whether each  
 5 claim, independently, relates back to a claim in a timely filed petition.

6       Respondents do not, in their motion to dismiss, specify which of McConnell’s  
 7 claims or subclaims are allegedly barred by the statute of limitations. The Court does  
 8 not read Respondents’ motion to dismiss to seriously argue that all of McConnell’s  
 9 claims are barred by the statute of limitations—it appears from a comparison of the first  
 10 and second amended petitions that such an argument would be largely frivolous.  
 11 However, because Respondents do not specify which claims or subclaims are subject  
 12 to their statute of limitations defense, they have failed to state their position with respect  
 13 to that defense. Respondents do not give McConnell fair notice of their defense. See  
 14 *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th Cir. 1979), *overruled on other*  
 15 *grounds by Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc)  
 16 (“The key to determining the sufficiency of pleading an affirmative defense is whether it  
 17 gives plaintiff fair notice of the defense.”).

18       Federal Rule of Civil Procedure 8(b)(1)(A) states that “[i]n responding to a  
 19 pleading, a party must ... state in short and plain terms its defenses to each claim  
 20 asserted against it....” Under the circumstances here—again, Respondents’ statute of  
 21 limitations defense is subject to a claim-by-claim analysis—Respondents must do more,  
 22 to properly plead their statute of limitations defense, than provide a formulaic recitation  
 23 of the law governing the statute of limitations and an allegation that the second  
 24 amended petition was filed after the expiration of the limitations period. At minimum,  
 25 Respondents must give McConnell fair notice which of his claims or subclaims are  
 26 subject to the defense.

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1           **IT IS THEREFORE ORDERED** that Petitioner's Motion to Strike, or, in the  
2 Alternative, Motion for More Definite Statement (ECF No. 107) is **GRANTED**.

3           **IT IS FURTHER ORDERED** that Respondents' Motion to Dismiss (ECF No. 105)  
4 is **DENIED**, without prejudice to Respondents filing a new motion to dismiss, adequately  
5 setting forth their statute of limitations defense or abandoning that defense.

6           **IT IS FURTHER ORDERED** that Respondents' will have **30 days** from the date  
7 of this order to file their new motion to dismiss. In all other respects, the schedule for  
8 further proceedings set forth in the order entered on December 4, 2019 (ECF No. 91)  
9 will remain in effect.

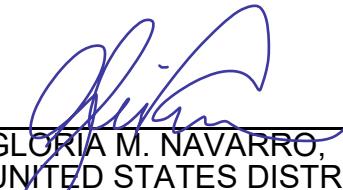
10          **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to update the  
11 docket for this case to reflect that Aaron Ford has been substituted for Adam Paul  
12 Laxalt as the respondent state attorney general (see Order entered December 4, 2019  
13 (ECF No. 91)).

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15          DATED THIS 2 day of March, 2021.

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GLORIA M. NAVARRO,  
UNITED STATES DISTRICT JUDGE

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